

REMARKS

Prior to this response, claims 1-31 are pending in this application.

Restriction Requirement under 35 U.S.C. § 121

The Examiner has required restriction to one of the asserted Inventions I-IV as detailed on pages 2-4 of the Office Action. Applicants respectfully traverse the Examiner's determination of separate inventions, particularly as it relates to Group I, claims 1-5, and Group II, claims 6-13.

There are two criteria for a proper restriction requirement: first, "the inventions must be independent ... or distinct" and second, "there must be a serious burden on the examiner." MPEP § 803 at p. 800-4. "If the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, even though it includes claims to independent or distinct inventions." See Manual of Patent Examination Procedure ("MPEP") § 803 at p. 800-4 (Rev. 3, Aug. 2005) (emphasis added).

"For purposes of the initial requirement, a serious burden on the examiner may be *prima facie* shown if the examiner shows by appropriate explanation of separate classification, or separate status in the art, or a different field of search. That *prima facie* showing may be rebutted by appropriate showings or evidence by the applicant." Id.

"Where, however, the classification is the same and the field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist for dividing among independent or related inventions." MPEP § 808.02 at p. 800-52 (Rev. 3, Aug. 2005).

In this case, the Examiner has not made a prima facie case, at least as to the claims of Groups I and II.

On page 2 of the Office Action, the Examiner has indicated that the classification for each of Groups I and II is the same: Class 424, subclass 445. Thus, the Examiner need only search one class and subclass for all of the claims in Groups I and II, regardless of whether the claims are restricted.

In support of his contention that an undue burden exists, the Examiner asserts on page 4 of the Office Action that "the inventions have acquired a separate status in the art in view of their different classification" and that "the inventions require a different field of search." The

Examiner thereby overlooks the fact that he had already determined that the claims of Group I and Group II have the same classification.

Further, the Examiner is required to consider “the particular teachings of each individual reference” whether or not the claims are restricted. See, e.g., 37 C.F.R. 1.104 (“On taking up an application for examination... the examiner shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention.”) Thus, the Examiner’s task of searching class 424, subclass 445 would be essentially the same whether or not the claims of Group II are restricted out.

For at least these reasons, the Examiner has not shown that a serious burden exists, at least with regard to Groups I and II, and Applicants respectfully submit that the Examiner is required to examine at least claims 1-13 on the merits. Applicants respectfully request reconsideration of the restriction requirement.

As required by 37 C.F.R. 1.143, Applicants make a provisional election of Group I, claims 1-5, with traverse, for at least the above-stated reasons. Accordingly, claims 6-13 are withdrawn, pending the Examiner’s reconsideration of the restriction requirement, which is respectfully requested, and pending the allowance of a generic claim. Claims 14-31 are canceled without prejudice or disclaimer of the subject matter recited therein, in response to the restriction requirement.

Election of Species

The Examiner has required election of one of the asserted species 1-3 as detailed on page 4 of the Office Action. Applicants do not acquiesce in the Examiner’s determination of separate species, however, in order to expedite prosecution of the present application, Applicants elect species (3): green food coloring. Applicants acknowledge with appreciation the Examiner’s indication that claim 1 is generic.

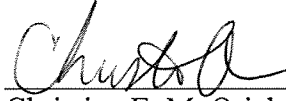
Concluding Remarks

If necessary, Applicants request that this response be considered a request for an extension of time appropriate for the response to be timely filed. Applicants request that any

required fees needed beyond those submitted with this response be charged to the deposit account of Bose McKinney & Evans, Deposit Account No. 02-3223.

The Examiner is invited to contact the undersigned at the telephone number provided below should any question or comments arise during the course of consideration of this matter.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Christine E. M. Orich", written over a horizontal line.

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